(3)

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NO: 86-1536

Supreme Court of the United States

October Term, 1986

WADE POWELL AND FREDA POWELL, HIS WIFE, AND ERWIN WHITE AND SUSAN WHITE, HIS WIFE, Petitioners,

v.

STATE OF FLORIDA, MUNROE REGIONAL MEDICAL CENTER, WILLIAM H. SHUTZE, M.D., KEITH GAUGER, THOMAS M. TECHMAN, M.D., NORTH FLORIDA LIONS EYE BANK, INC., THE MEDICAL EYE BANK, INC., FLORIDA LIONS EYE BANK, INC., FLORIDA SOCIETY OF OPHTHALMOLOGY, INC., METROPOLITAN DADE COUNTY AND THE FLORIDA MEDICAL ASSOCIATION, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENTS' BRIEF IN OPPOSITION

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1191p

QUESTIONS PRESENTED FOR REVIEW

1. Does removal of the corneae of a decedent, without the consent of the next of kin, authorized by State law, violate any fundamental rights of privacy or personal liberty guaranteed by the Due Process Clause?

2. If no constitutional rights of fundamental magnitude are involved, are there any rights created by State law, to which the safeguards of procedural due process apply and which would be violated by removal of corneae from a decedent without the consent of the next of kin?

PARTIES BELOW

The parties, Petitioners and Respondents, are correctly identified in the Petition (i-ii), except that William H. Shutze, M.D. and Thomas M. Techman,

M.D., are, respectively, the Fifth District Medical Examiner, and Associate District Medical Examiner, for the State of Florida.

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REASONS WHY THE PETITION SHOULD BE DENIED

I. NEITHER THE DECISIONS OF THIS COURT, NOR THE RECORD IN THESE CASES, WARRANT THE COURT'S EXPANDING THE FUNDAMENTAL RIGHTS SECURED BY THE CONSTITUTION TO INCLUDE PETITIONERS' INTEREST IN THEIR DECEASED SONS' BODIES.

The overall question raised by the Petition for Writ of Certiorari is whether the right of family members to possess and dispose of their decedents' remains is one of constitutional magnitude, so that a need exists for federal-law uniformity among the states. If not, then the matter of sepulture interests, and the protections and limitations of those interests, are properly questions of state law, to be determined variably as the differing states see fit.

Petitioners assert that the interest at stake in these consolidated cases is that of surviving family members' reverence

for the dead (Petition at 20, 21). They assert that this interest is one of constitutional magnitude, embedded in the core of fundamental, substantive protection afforded by the Due Process Clause (id. at 13-14, 17).

Citing no applicable authority from this Court, however, Petitioners claim that this interest is a fundamental constitutional right (1) because it is historically and traditionally among matters of personal choice involved in family life (id. at 15, 16, 17, 21); and (2) because it is among religious and conscientious values, all protectable

through the Due Process Clause.[1] The Petition for Certiorari, in short, is a request for the Court to establish a new, fundamental constitutional right.

1. Petitioners concede that this is precisely the same argument considered and rejected by the Florida Supreme Court (Petition at 18-20).

> We reject appellees' [petitioners'] argument. The cases cited recognize only freedom of choice concerning personal matters involved in existing, ongoing

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[1]The First Amendment safeguard of religious faith, through the Free Exercise Clause, is applicable to the states by means of the Due Process Clause of the Fourteenth Amendment. Hobbie v. Unemployment Appeals Commission of Fla., ___ U.S. ____, 107 S.Ct. 1046, 1048 (1987); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 211, 68 S.Ct. 461, 465, 92 L.Ed. 649 (1948); Cantwell v. Connecticut, 311 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940).

> relationships among living persons as fundamental or essential to the pursuit of happiness by free persons. We find that the right of the next of kin to a tort claim for interference with burial, established by this Court ... does not rise to the constitutional dimension of a fundamental right traditionally protected under either the United States or Florida Constitution.

Florida v. Powell, 497 So.2d 1188, 1193 (Fla. 1986) (A-31) (emphasis added).

The Florida Supreme Court's analysis of this Court's decisions, recognizing constitutional rights as fundamental and essential to the orderly pursuit of happiness by free persons, was correct as a matter of federal law. This Court has limited that heightened constitutional protection to highly personal relationships among living persons. This Court's

decisions, refusing to extend this scope of constitutional protection to other relationships in the range of human experiences, emphasize the restricted realm of fundamental rights. See, e.g., Bowers v. Hardwick, ___ U.S. _____, 106 S.Ct. 2841, 2843-44, 2846 (1986); Regents v. Ewing, ___ U.S. _____, 106 S.Ct. 507, 515-16 (1985) (Powell, J., concurring); Roberts v. United States Jaycees, ___ U.S. _____, 104 S.Ct. 3244, 3250-51 (1984); Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 844-45, 97 S.Ct. 2994, 2109-10, 53 L.Ed.2d 14 (1977).

Courts of other states have upheld their similar statutes against like attacks that they infringed fundamental constitutional rights. In Tillman v. Detroit Receiving Hospital, 138

Mich.App. 683, 360 N.W.2d 275 (1984), the Court rejected the plaintiff's claim "that as next of kin she has an inherent, fundamental right to bury her decedent's body without mutilation," id. at 277; and that the Michigan statute violated that right.

> The threshold question is whether plaintiff has privacy rights which are implicated here. Only rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in the guaranty of the right of personal privacy. ...
>
> We do not find this common law right ["to the possession, control, or burial of a dead body"] to be of constitutional dimension. The privacy right encompasses the right to make decisions concerning the integrity of one's body. ... This

> right is, however, a personal one. It ends with the death of the person to whom it is of value. It may not be claimed by his estate or his next of kin.

Id. at 277 (A-31). Similarly, the Georgia Supreme Court flatly announced that it did "not find this common law concept to be of constitutional dimension." Georgia Lions Eye Bank, Inc. v. Lavant, 255 Ga. 60, 335 S.E.2d 127, 128 (1985), cert. denied __ U.S. ____, 106 S.Ct. 1464, 89 L.Ed.2d 721 (1986) (A-19).

Contrary to Petitioners' contention (Petition at 15-17), history and tradition indicate that the sepulture interests of surviving family members in their decedents' bodies, is not a right "long recognized at common law as essential to the orderly pursuit of happiness by free men," Meyer v. Nebraska, 262 U.S. 390, 399, 43

S.Ct. 625, 626 (1923). English common law accorded no property or other rights in the body of a deceased person. See, e.g., Georgia Lions Eye Bank, Inc. v. Lavant, 335 S.E.2d at 128; Jackson v. Rupp, 228 So.2d 916, 918 (Fla. 4th D.C.A. 1969), aff'd 238 So.2d 86 (Fla. 1970).

In fact, this is simply one facet of an entire field of human activity that has historically and traditionally been regulated by the individual states, under the powers reserved to them by the Tenth Amendment. Cf. United States v. Darby, 312 U.S. 100, 123-24, 61 S.Ct. 451, 462 (1941); United States v. Sprague, 282 U.S. 716, 733-34, 51 S.Ct. 220, 222-23 (1931). Whether or not a decedent's own body is disposed of in accordance with his wishes and directions is a matter controlled by state law. Likewise, the conditions

under which a dead body may be disposed of are governed by state law.[2] The authority to perform autopsies -- massive intrusions -- on decedents' bodies is provided by state law.[3] Even the liability for interfering with, or mutilating, a dead body is a creature of state law. Florida v. Powell, 497 So.2d at 1191-92; Georgia Lions Eye Bank, Inc. v. Lavant, 335 S.E.2d

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[2]For example, Florida law establishes conditions pertaining to (1) cremation, Fla. Stat. §872.03; (2) interment, Fla. Stat. §382.14; (3) transit for burial, Fla. Stat. §382.061; (4) testimentary donations of bodies and body parts, Fla. Stat. §§245.11, 732.912, 732.914, 732.916, 732.917; and (5) disposition and use of unclaimed bodies, Fla. Stat. §245.06 et seq.

[3]Fla. Stat. §406.11, authorizing medical examiners to perform autopsies under specified circumstances of death, was upheld by the trial court as constitutional, over Petitioners' challenge, and has been left unreviewed on appeal. Florida v. Powell, 497 So.2d at 1190 n.2 (A-31).

at 128; Tillman v. Detroit Receiving Hospital, 360 N.W.2d at 277.

Although, like other interests governed by state law, possessing and disposing of the bodies of their decedents is a significant concern to surviving family members, that does not make it one of constitutional character, much less among the fundamental freedoms substantively guaranteed by the Due Process Clause. Were it otherwise, the essential liberty secured by the Due Process Clause would be engulfed by every serious concern encountered in human experience: when every interest is basic, none is truly fundamental.

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable

and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clause of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Bowers v. Hardwick, ___ U.S. ____ at ____, 106 S.Ct. at 2846.

2. There is an important difference, bypassed by Petitioners, in whether the interest which they press the Court to recognize as fundamental is based upon precepts of individual religious faith, or is (as with Petitioners here) simply an individual "matter of conscience" (Petition at 24). While the nature of religious tenets and beliefs may differ, they are all entitled to the same strict-scrutiny protection of the First Amendment, regardless of the particular principles involved. Hobbie v. Unemployment Appeals Commission of Fla., ___ U.S. at ____, 107 S.Ct. at 1049-50, 1051 n.9; United States v. Ballard, 322 U.S. 78, 87, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1944).

> The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that '[t]he essence of all that has been said and written on the subject is that only those interests of the highest order...can overbalance legitimate claims to the free exercise of religion.' [quoting Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)].

Thomas v. Review Board of Indiana Employment Security Div., 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981).

While "religious beliefs need not be acceptable, logical, consistent, or

comprehensible to others in order to merit First Amendment protection," id. at 714, 101 S.Ct. at 1430, they must, nonetheless, be religious beliefs. "Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." Id. at 713, 101 S.Ct. at 1430. Differing beliefs and values based simply on matters of varying, individual conscience, however, are not entitled to that same bulwark of protection by the Free Exercise Clause of the First Amendment. See, e.g., Wisconsin v. Yoder, 406 U.S. at 216, 92 S.Ct. at 1533:

> Thus, if [parties] asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his

> time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Without an anchor in precepts of religious faith, Petitioners' "conscientious values," and their "conscientious objection" to the Florida cornea removal statute, Fla. Stat. §732.9185 (Petition at 22, 23), do not qualify for the strict scrutiny, and compelling interest to overbalance them, that the Free Exercise Clause requires.

The Florida Supreme Court recognized the importance of the distinction between religious beliefs, and matters of individual conscience, when it rejected Petitioners' claim of fundamental right implicitly based on the Free Exercise Clause.

> The record contains no evidence that the Appellees' [Petitioners'] objections to the removal of corneal tissues for human transplants are based on any 'fundamental tenets of their religious beliefs.' Wisconsin v. Yoder, 406 U.S. at 218, 92 S.Ct. at 1534. '[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.' Id. at 215-16, S.Ct. at 1533.

Florida v. Powell, 497 So.2d at 1193. The evidentiary void in the record that led the Florida Supreme Court to reject any Free Exercise Clause basis for Petitioners' claim, would necessarily compel the same conclusion from this Court.

II. THE FLORIDA SUPREME COURT'S RULING THAT PETITIONERS, AS NEXT OF KIN, HAVE NO LIBERTY OR PROPERTY INTEREST UNDER FLORIDA LAW IN THE REMAINS OF THEIR DECEDENTS IS AN INTERPRETATION OF THE FLORIDA CORNEA REMOVAL STATUTE THAT PRECLUDES THIS COURT FROM RULING CONTRARIWISE.

Petitioners attempt to bootstrap themselves into a position where the procedural safeguards of the Due Process Clause would apply. To do that, however, they necessarily ask this Court to do what it may not -- to disregard the construction by the Florida Supreme Court of Florida Law, including the Florida cornea removal statute, Fla. Stat. §732.9185.

Petitioners cite authorities for the proposition that, to be protected by the procedural requirements of due process, liberty interests, like property interests, "may arise from state law." [Petition at 27 n.13]. They then argue that the Florida cornea removal statute may be

interpreted so as to confer upon the next of kin (such as Petitioners) a liberty interest in objecting to the removal of corneal tissue from the body of a deceased: "the statute clearly recognizes a right to object, and that right is protected by due process of law" (Petition at 27).

Petitioners candidly concede, however, that the Florida Supreme Court did not so construe that statute: "It was not read that way below" (Petition at 27). Indeed, the Supreme Court of Florida expressly concluded that Petitioners "have no protectable liberty or property interest in the remains of their decedents," and that therefore the question of whether the "procedural safeguards guaranteed by the due process clause" were met simply did

not arise. 497 So.2d at 1193 (A-31).[4]

That interpretation of Florida law, including the statute in question, is binding upon this Court. New York v. Ferber, 458 U.S. 747, 769 n.24, 102 S.Ct. 3348, 3361 n.24, 73 L.Ed.2d 1113 (1982); Hortonville Joint School District No.1 v. Hortonville Education Ass'n, 426 U.S. 482, 488, 96 S.Ct. 2308, 2312, 49

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[4]Because the interpretation of state law by the state courts may eliminate any need to consider issues involved in federal constitutional challenges to state law, it is appropriate to defer decisions on the federal issues until a state court construction has been made. See, e.g., Harrison v. NAACP, 360 U.S. 167, 176-77, 79 S.Ct. 1025, 1030 (1959); Albertson v. Millard, 345 U.S. 242, 245, 73 S.Ct. 600, 602 (1953). Cf. United States v. Little Lake Misere Land Co., 412 U.S. 580, 605, 93 S.Ct. 2389, 2403 (1973) (Stewart, J., concurring in judgment). The wisdom of this principle is confirmed by the case at hand, since the Florida Supreme Court's interpretation of Florida law has obviated any question of Petitioners having an interest protectable by procedural due process.

L.Ed.2d 1 (1976); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688, 79 S.Ct. 1362, 1365 (1959); Albertson v. Millard, 345 U.S. 242, 244, 73 S.Ct. 600, 602 (1953); United States v. Burnison, 339 U.S. 87, 89, 70 S.Ct. 503, 504 (1950); Aero Mayflower Transit Co. v. Board of RR. Commissioners, 332 U.S. 495, 499-500, 68 S.Ct. 167, 169-70 (1947); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 461, 67 S.Ct. 374, 375 (1947). Accordingly, Petitioners' tacit invitation to read into the statute a liberty interest for the next of kin, notwithstanding the contrary view of the Florida Supreme Court, must be declined.

CONCLUSION

The Court should turn away Petitioners' entreaty to create a new, fundamental

constitutional right, and deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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STATE OF FLORIDA, MUNROE REGIONAL MEDICAL CENTER, WILLIAM H. SHUTZE, M.D., KEITH GAUGER, THOMAS M. TECHMAN, M.D., NORTH FLORIDA LIONS EYE BANK, INC., THE MEDICAL EYE BANK, INC., FLORIDA LIONS EYE BANK, INC., FLORIDA SOCIETY OF OPHTHALMOLOGY, INC., METROPOLITAN DADE COUNTY AND THE FLORIDA MEDICAL ASSOCIATION, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX TO BRIEF IN OPPOSITION

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138 Mich.App. 683, 360 N.W.2d 275 (Mich.App. 1984)

Alma TILLMAN, Plaintiff-Appellant

v.

DETROIT RECEIVING HOPSITAL and University Health Center, a Michigan non-profit corporation, Michigan Eye Bank, a Michigan non-profit corporation and Werner Spitz, M.D., and John Doe and Jack Roe, Defendants-Appellees.

Docket No. 75006.
Court of Appeals of Michigan.
Submitted Aug. 2, 1984.
Decided Nov. 6, 1984.
Released for Publication Jan. 7, 1985.

Mother of decedent brought action against hospital, eye bank, medical examiner and others, alleging that her daughter's corneas and eyes were removed without her consent and in violation of state law. The Wayne Circuit Court, Henry J. Szymanski, J., entered summary judgment for eye bank and medical examiner, and mother appealed. The Court of Appeals, R.B. Burns, J., held that: (1) common-law

right of mother to bury daughter without mutilation was not encompassed by constitutional right of privacy, and (2) mother's conjecture that daughter's eyes were removed did not establish genuine issue of material fact in light of affidavits by medical examiner, medical technician who performed corneal excision, and funeral director who embalmed body, all of which indicated that eyes were not removed.

Affirmed.

1. Constitutional Law [Key] 82(7)

Only rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the constitutional guaranty of the right of personal privacy.

2. Dead Bodies [Key] 1

There is no property right in the

next of kin to a dead body.

3. Dead Bodies [Key] 9

Person entitled to possession, control or burial of a dead body has common-law cause of action for tort of interference with the right of burial of a deceased person without mutilation.

4. Constitutional Law [Key] 82(7)

Constitutional right to privacy, which encompasses right to make decisions concerning the integrity of one's body, is a personal one that ends with the death of a person to whom it is of value, and may not be claimed by his estate or his next of kin.

5. Judgment [Key] 181(33)

In action by mother of decedent claiming interference with her right to bury her daughter without mutilation, in which constitutionality of cornea removal

statute was challenged, mother's conjecture that daughter's eyes were removed did not establish genuine issue of material fact where affidavits of technician who performed corneal excision procedure, medical examiner who performed autopsy, and funeral director who embalmed and prepared body for viewing indicated that eyes were not removed and that there was no facial disfigurement. M.C.L.A. §§ 333.10201 et seq.

6. Coroners [Key] 14

Medical examiner is empowered by statute to retain body portions of autopsy subject for further criminal investigation. M.C.L.A. § 52.205.

Bahr & Bergesen by Edward A. Shuttle, Troy, for plaintiff-appellant.

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Karen G. Watkins, Asst. Corp. Counsel, Detroit, for defendant Wayne County Medical Examiner.

Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C. by William J. Lynch and Christine D. Oldani, Detroit, for defendant-appellee Mich. Eye Bank.

Before HOOD, P.J., and R.B. BURNS and EVERETT*, JJ.

R.B. BURNS, Judge.

Plaintiff's daughter, Mary Catherine Tillman, was admitted to Detroit Receiving Hospital and University Health Center on December 25, 1982. She died at approximately 7:44 p.m. that evening. An autopsy was performed on the body at the Wayne County Morgue on December 26,

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*Stanley Everett, 37th Judicial Circuit Judge, sitting on Court of Appeals by assignment pursuant to Const. 1963, Art. 6, Sec. 23, as amended 1968.

1982. The cause of death was listed as an accidental gunshot wound to the back.

Plaintiff filed a complaint in the Wayne County Circuit Court against Detroit Receiving Hospital and University Health Center, the Michigan Eye Bank, Wayne County Medical Examiner Dr. Werner Spitz, and two unknown individuals, alleging that her daughter's corneas and eyes were removed without her consent and in violation of state law.[1] Each of the named defendants individually filed a motion for summary judgment under GCR 1963, 117.2(3).

On October 21, 1983, the trial court granted the motions on behalf of defendants Michigan Eye Bank and the Wayne County

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[1]In the lower court, plaintiff also alleged damages for the unauthorized removal of decedent's brain and for malpractice. Apparently, those allegations have been dropped on appeal.

Medical Examiner.[2] In a bench opinion the court ruled that, other than plaintiff's own assumptions, plaintiff had failed to produce any evidence to prove that the decedent's eyes were removed. The court also found that the medical examiner's function in this case cloaked constitutionality of the cornea removal statute, M.C.L. § 333.10201 et seq.; M.S.A. § 14.15(10201) et seq., was without merit. Plaintiff appeals and we affirm.

The portion of the statute relevant to this appeal states:

> (1) In any case in which an autopsy is to be done by a county medical examiner or a county medical examiner causes an autopsy to be done, the cornea of

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[2]Detroit Receiving Hospital and University Health Center was dismissed as a party-defendant by stipulation of the parties and by order dated October 24, 1983.

the deceased person may be removed by a person authorized by the county medical examiner.

(2) Removal under subsection (1) may be made only under the following circumstances:

(a) An autopsy has already been authorized by the county medical examiner.

(b) The county medical examiner does not have knowledge of an objection by the next of kin of the decedent to the removal of the cornea.

(c) The removal of the cornea will not interfere with the course of any subsequent investigation or autopsy or alter post-mortem facial appearance. M.C.L. § 333.10202; M.S.A. § 14.15(10202).

The county medical examiner, the assistant county medical examiner, a bank or storage facility, or any person authorized by the county medical examiner to remove the

> cornea of a deceased person, shall not be liable in a civil action if it is subsequently alleged that authorization for the removal was required of the next of kin. M.C.L. § 333.10203; M.S.A. § 14.15(10203).

Plaintiff claims this statute is an unconstitutional invasion of the right of privacy.

[1-3] The threshold question is whether plaintiff has privacy rights which are implicated here. Only rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the guaranty of the right of personal privacy. Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Advisory Opinion on Constitutionality of 1975 PA

227 (Questions 2-10), 396 Mich. 465, 505, 242 N.W.2d 3 (1976). Plaintiff claims that as next of kin she has an inherent, fundamental right to bury her decedent's body without mutilation. While there is no property right in the next of kin to a dead body, Deeg v. Detroit, 345 Mich. 371, 375, 76 N.W.2d 16 (1956), Michigan jurisprudence recognizes a common law cause of action on behalf of the person or persons entitled to the possession, control, or burial of a dead body for the tort of interference with the right of burial of a deceased person without mutilation. Id.

[4] We do not find this common law right to be of constitutional dimension. The privacy right encompasses the right to make decisions concerning the integrity of one's body. Roe v. Wade, supra. This

right is, however, a personal one. It ends with the death of the person to whom it is of value. It may not be claimed by his estate or his next of kin. Hubenschmidt v. Shears, 403 Mich. 486, 489, 270 N.W.2d 2 (1978); McLean v. Rogers, 100 Mich.App. 734, 737, 300 N.W.2d 389 (1980). Accordingly, we reject plaintiff's constitutional challenge predicated on the right to privacy.

Plaintiff next contends that the trial court erred in finding there was no genuine issue of material fact that (1) the eyes of plaintiff's decedent were removed or that (2) the corneas of plaintiff's decedent were removed in such a way as to alter her post-mortem facial appearance.

In Maccabees Mutual Life Ins. Co. v. Dep't. of Treasury, 122

Mich.App. 660, 662-663, 332 N.W.2d 561 (1983), the standard of review is summarized:

> GCR 1963, 117.2(3), allows the trial court to grant summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Szidik v. Podsiadlo, 109 Mich. App. 446, 448-449; 311 N.W.2d 386 (1981). A motion based on this subrule is designed to test whether there is factual support for a claim. Partrich v. Muscat, 84 Mich.App. 724, 730; 270 N.W.2d 506 (1978). The court must consider the pleadings, affidavits and other available evidence and be satisfied that the claim asserted cannot be supported by any evidence at trial. Jacobs v. Detroit Automobile Inter-Ins Exchange, 107 Mich.App. 424, 432; 309 N.W.2d 627 (1981),

lv den, 414 Mich 872 (1982). The court must be satisfied that it is impossible for the claim to be supported at trial because of some deficiency which cannot be overcome. Rizzo v. Kretschmer, 389 Mich. 363, 372; 207 N.W.2d 316 (1973). The court must give the benefit of any reasonable doubt to the opposing party and inferences are to be drawn in favor of the one opposing the motion. Littsey v. Wayne State University Bd of Governors, 108 Mich. App. 406, 416; 310 N.W.2d 399 (1981), lv den, 413 Mich. 882 (1982). A party opposing the motion for summary judgment has the burden to come forward with some evidentiary proof that a genuine issue of fact does exist. If the opposing party fails to do so, the motion for summary judgment is property granted. Durant v. Stahlin, 375 Mich.

628, 640; 135 N.W.2d 392 (1965).

[5] Defendants filed three affidavits with their motions for summary judgment. Technician Pandora Andrews in her affidavit stated that on December 26, 1982, at 12:30 a.m. she performed a corneal tissue excision on plaintiff's decedent after receiving authorization of the county medical examiner's office. She removed corneal tissue one-half millimeter in thickness and this did not alter the facial appearance of the corpse. She did not remove the eyes or brain. At the time she performed the corneal tissue excision, Andrews had no knowledge of any objection by the deceased's next of kin.

In his affidavit, defendant Werner Spitz stated that he knew of no objection of the next of kin when he authorized the removal of the corneas of plaintiff's

decedent. He averred that he made the decision to conduct an autopsy prior to giving corneal removal authorization and that the corneas but not the eyes were removed prior to the autopsy. He stated that, in reviewing notes subsequent to the autopsy, he noticed on both the manuscript and diagram references to the removal of decedent's eyes. These references were in error because only decedent's corneas had been removed. When the body was released to the funeral home, decedent's facial appearance was unaltered.

The affidavit of Raymond Cantrell, funeral director, states that he embalmed and prepared for viewing the body of plaintiff's decedent. In so doing he did not perform an eye-socket buildup procedure which would have been imperative had the deceased's eyes been removed.

With the filing of these affidavits, it became incumbent on plaintiff to come forth with evidence to create a disputed issue of fact, i.e., that her decedent's eyes were removed or facial appearance was altered. Durant v. Stahlin, supra.

The affidavits of Paula Lombard, decedent's sister, and Rhonda Tillman, decedent's sister-in-law, and plaintiff aver that they personally observed decedent in her coffin and that her eyes were sunken. Plaintiff and Rhonda Tillman also stated that they had telephoned the medical examiner's office and unidentified persons told them that decedent's eyes had been removed. Photographs taken of decedent in her coffin were also admitted.

The trial court was correct. Met with affidavits of the technician who performed the corneal excision procedure,

the medical examiner who performed the autopsy, and the funeral director who embalmed and prepared the body for viewing -- each of whom stated the eyes of plaintiff's decedent were not removed and there was no disfigurement -- plaintiff presented no evidence to rebut this and raise a question of fact. Mere conjecture does not meet the burden to come forward with evidentiary proof to establish that there exists a genuine issue of material fact. Szidik v. Podsiadlo, 109 Mich.App. 446, 451, 311 N.W.2d 386 (1981). Accordingly, the trial court's grant of summary judgment is affirmed.

[6] Even assuming that plaintiff's allegations are true and that the eyes of her decedent were removed, a medical examiner may retain body portions for further criminal investigation. M.C.L. §

52.205; M.S.A. § 5.953(5); Allinger v. Kell, 102 Mich.App. 798, 302 N.W.2d 576 (1981). Recognizing that she is unable to explain why a medical examiner who may statutorily retain body parts would find it necessary to, as plaintiff alleges, "alter" diagrams to "cover up" the fact that the eyes were removed, plaintiff now claims additional discovery time is needed to reveal the medical examiner's motives. Plaintiff did not request additional time for discovery at the trial court level and we will not consider this claim.

Affirmed.

255 Ga. 60, 335 S.E.2d 127, 128 (Ga. 1985), cert.denied ___ U.S. ____, 106 S.Ct. 1464, 89 L.Ed.2d 721 (1986)

GEORGIA LIONS EYE BANK, INC. et al.

v.

LAVANT.

No. 42351.
Supreme Court of Georgia.
Oct. 9, 1985.
Rehearing Denied Oct. 29, 1985.

Mother of infant, who had died of sudden infant death syndrome, brought suit against hospital and an eye bank for the wrongful removal of corneal tissue of infant following death pursuant to statute. The State Court, Chatham County, David R. Elmore, Senior Judge, held that statute authorizing removal for transplant of corneal tissue of decedents violated due process, and appeal was taken. The Supreme Court, Weltner, J., held that:

(1) in Georgia, there is no constitutionally protected right in a decedent's body, and (2) statute authorizing removal for transplant of corneal tissue of decedents if no objection is made by decedent in his life or by his next-of-kin after death is constitutional.

Reversed.

Marshall, P.J., filed dissenting opinion.

1. Constitutional Law [Key] 82(6)

In Georgia, there is no constitutionally protected right in a decedent's body; rather, concept of quasi property recognizes interests of surviving relatives in possession or control of decedent's body, and such common-law concept is not of constitutional dimension.

2. Common Law [Key] 11

Right of action existing at common law

may be modified or abrogated by legislature.

3. Dead Bodies [Key] 1

The General Assembly had it within its power, in interest of public welfare, to authorize removal for transplant of corneal tissue of decedents, and thus, O.C.G.A. § 31-23-6(b)(1), which authorizes such procedure if no objection is made by decedent in his life or by his next-of-kin after death is constitutional. U.S.C.A. Const.Amends. 5, 14.

Kent & Barrow, A. Martin Kent, Stanley M. Karsman, Karsman, Brooks, Painter & Callaway, P.C., Savannah, William B. Gunter, Everette L. Doffermyre, Jr., Constance C. Russell, Kilpatrick & Cody, Atlanta, Joseph B. Brennan, Bouhan, Williams & Levy, Savannah, for Georgia Lions Eye Bank, Inc., et al.

Walter W. Ballew III, Kran Riddle, Calhoun, Hubbard, Riddle & Cox, P.C., Savannah, for Patricia P. Lavant.

WELTNER, Justice.

This appeal is from an order of the State Court of Chatham County holding unconstitutional O.C.G.A. § 31-23-6(b)(1), which authorizes, under specified circumstance,[1] removal for transplant of the corneal tissue of decedents if no objection is made by the decedent in his life or by his next-of-kin after death.

This law was enacted by a virtually unanimous General Assembly in 1978. The record indicates that before its passage,

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[1]O.C.G.A. § 45-16-27(a)(1) provides, in part, that coroners shall require a post-mortem examination or autopsy when any person dies "suddenly when in apparent good health."

approximately 25 corneal transplants were performed each year. In 1984, however, more than 1000 persons regained their sight through transplants.

Pursuant to this Code section, officials of the Georgia Lions Eye Bank emoved during autopsy the corneal tissue of an infant, who had died of sudden infant death syndrome. While the parents of the infant did not object, there was no notice of the intended removal, nor any realistic opportunity to object. Sometime later, the mother discovered for the first time that the corneal tissue had been removed. She brought suit against St. Joseph's Hospital and the Georgia Lions Eye Bank for the wrongful removal of the tissue.

The court held the statute violative of due process in that it deprives a

person of a property right in the corpse of his next-of-kin, and fails to provide notice and an opportunity to object.

1. In the earlier days of the common law, so Blackstone avers, no property right existed relative to a dead body, and matters concerning corpses were left to the ecclesiastical courts. "But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains, when dead and buried." 2 W. Blackstone, Commentaries *429 (T. Cooley, ed. 1899).

Because there were no ecclesiastical courts in this country to resolve matters relating to corpses, the courts conceived

the notion of "quasi-property right," when referring to the interest of relatives in the bodies of their next-of-kin. Dean Prosser noted: "It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer." W.L. Prosser and W.P. Keeton, Prosser and Keeton on Torts, p.63 (5th ed. 1984).

In Georgia, an early case considering this interest of next-of-kin is Louisville Railroad Co. v. Wilson, 123 Ga. 62, 51 S.E. 24 (1905). The precise nature of the interest was never defined, although we held that some type of claim was stated. However, in Pollard v. Phelps, 56 Ga.App. 408, 415, 193 S.E. 102, 107

(1937), the court held that "[a]t common law no property right was held to exist in a dead body; and though this view is still maintained in a strict sense, the courts of civilized and Christian countries regard respect for the dead as not only a virtue but a duty, and hold that, in the absence of testamentary disposition, a quasi property right belongs to the husband or wife, and, if neither, to the next of kin." See also Rivers v. Greenwood Cemetery, Inc., 194 Ga. 524, 525, 22 S.E.2d 134 (1942), wherein we held "that a dead body is quasi property over which the relatives of the deceased have rights which the courts will protect."

[1] Thus, it can be seen that in Georgia, there is no constitutionally protected right in a decedent's body. Rather, the courts have evolved the

concept of quasi property in recognition of the interests of surviving relatives in the possession and control of decedents' bodies. We do not find this common law concept to be of constitutional dimension.

[2] 2. A right of action existing at common law may be modified or abrogated by the legislature. Teasley v. Mathis, 243 Ga. 561, 255 S.E.2d 57 (1979).

"A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the

great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." Munn v. Illinois, 4 Otto 113, 94 U.S. 113, 134, 24 L.E. 77 (1876).

3. "'The preservation of the public health is one of the duties devolving upon the State as a sovereign power. In fact, among all the objects sought to be secured by governmental laws, none is more important than the preservation of the public health'; ... 'Health regulations are of the utmost consequence to the general welfare; and if they are reasonable, impartial, and not against the general policy of the State, they must be submitted to by individuals for the good of the public, irrespective of pecuniary loss.'" Abel v. State, 64 Ga.App. 448, 452-453, 13

S.E.2d 507 (1941).

[3] Certainly, the General Assembly has it within its power, in the interest of the public welfare, to authorize this procedure, which yearly benefits hundreds of Georgians.

The motions for summary judgment of the hospital and the eye bank should have been granted.

Judgment reversed.

All the Justices concur, except MARSHALL, P.J., who dissents.

MARSHALL, Presiding Justice, dissenting.

While I am heartily in favor of the purpose of the statute in question to provide corneal tissue for transplants, I am constrained to hold that the statute violates the due process provisions of the Constitutions of Georgia and the United

States. The statute fails to provide notice to the next of kin and a realistic opportunity to object to the corneal tissue removal, and, therefore, in my opinion, violates the fundamentals of due process.

I respectfully dissent.

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255 Ga. 60, 335 S.E.2d 127, 128 (Ga. 1985), cert.denied ___ U.S. ____, 106 S.Ct. 1464, 89 L.Ed.2d 721 (1986)

Patricia P. LAVANT, petitioner, v. ST. JOSEPH'S HOSPITAL and Georgia Lions Eye Bank, Inc. No. 85-1264.

Case below, Georgia Lions Eye Bank, Incorporated v. Lavant, 255 Ga. 60, 335 S.E.2d 127.

Petition for writ of certiorari to the Supreme Court of Georgia.

March 24, 1986. Denied.

497 So.2d 1188 (Fla. 1986)

STATE OF FLORIDA, et al., Appellants,

v.

Wade POWELL, et ux., et al., Appellees.

No. 67755.
Supreme Court of Florida.
Oct. 30, 1986.
Rehearing Denied Dec. 22, 1986.

Petition was filed to review an order of the Circuit Court, Marion County, William T. Swigert, J., finding unconstitutional statute authorizing medical examiners to remove corneal tissue from decedents during statutorily required autopsies when the tissue is needed for transplantation. The District Court of Appeal certified that the case presented a quesiton requiring immediate resolution. The Supreme Court, Overton, J., held that statute rationally promotes permissible state objective of restoring sight to the

blind and is thus constitutional.

Reversed and remanded.

Shaw, J., filed a dissenting opinion.

1. Dead Bodies [Key] 1

Statute authorizing medical examiners to remove corneal tissue from decedents during statutorily required autopsies when tissue is needed for transplantation rationally promotes permissible state objective of restoring sight to the blind and is thus constitutional. West's F.S.A. § 732.9185.

2. Eminent Domain [Key] 2(1.1)

Statute authorizing medical examiners to remove corneal tissue from decedents during statutorily required autopsies when tissue is needed for transplantation does not effect taking of private property by state action for nonpublic purpose in violation of State Constitution. West's

F.S.A. Const. Art. 5, § 3(b)(5); Art. 10, § 6; West's F.S.A. § 732.9185.

3. Constitutional Law [Key] 82(6)

Right of next of kin to tort claim for interference with burial does not rise to constitutional dimension of fundamental right traditionally protected by Constitution.

4. Constitutional Law [Key] 225.1
Dead Bodies [Key] 1

Statute authorizing medical examiners to remove corneal tissue from decedents during statutorily required autopsies when tissue is needed for transplantation does not create invidious classification regarding next of kin of deceased persons, and thus, does not violate equal protection clause. West's F.S.A. § 732.9185; West's F.S.A. Const. Art. 5, § 3(b)(5); U.S.C.A. Const. Amend. 14.

Jim Smith, Atty. Gen. and Kenneth McLaughlin, Asst. Atty. Gen., Tallahassee, for State of Florida.

Alan C. Sundberg, George N. Meros, Jr. and F. Townsend Hawkes of Carlton, Fields, Ward, Emmanuel, Smith and Cutler, Tallahassee, for Medical Eye Bank, Inc., North Florida Lions Eye Bank, Inc., and Florida Lions Eye Bank, Inc.

Andrew G. Pattillo, Jr. and Russell W. LaPeer of Pattillo and McKeever, Ocala, for William H. Shutze, M.D., Thomas M. Techman, M.D., and Keith Gauger.

Craig A. Dennis of Perkins & Collins, Tallahassee, for Florida Society of Ophthalmology, Inc.

Donald W. Weidner, Associate Gen. Counsel, Jacksonville, for Florida Medical Association, Inc.

Robert A. Ginsburg, Dade Co. Atty. and

Robert L. Blake, Asst. Co. Atty., Public Health Division, Jackson Memorial Hospital, Miami, for Dade County, intervenor.

Jerome J. Bornstein and Mark P. Lang, Staff Counsel, American Civil Liberties, Orlando, and Stephen T. Maher, American Civil Liberties Union Foundation of Florida, Inc., University of Miami School of Law, Coral Gables, for Wade Powell and Freda Powell.

James T. Reich, and Jack Singbush of Jack Singbush, P.A., Ocala, for Erwin White and Susan White.

Frederick H. von Unwerth of Kilpatrick & Cody, Washington, D.C., for the Eye Bank Association of America, Inc., amicus curiae.

Melinda L. McNichols of Arky, Freed, Stearns, Watson, Greer and Weaver, P.A., Miami, for Reverand Thomas J. Price, amicus curiae.

Benedict P. Kuehne of Bierman, Sonnett, Shohat and Sale, P.A., Miami, for the Rabbinical Association of Greater Miami, Temple Beth Or, and Rabbi Rami Shapiro, PH.D., amicus curiae.

OVERTON, Justice.

This is a petition to review a circuit court order finding unconstitutional section 732.9185, Florida Statutes (1983), which authorizes medical examiners to remove corneal tissue from decedents during statutorily required autopsies when such tissue is needed for transplantation. The statute prohibits the removal of the corneal tissue if the next of kin objects, but does not require that the decedent's next of kin be notified of the procedure. The Fifth District Court of Appeal certified that this case presents a question of great public importance requiring immediate

resolution by this Court. We accept jurisdiction pursuant to article V, section 3(b)(5), Florida Constitution, and, for the reasons expressed below, find that the statute is constitutional.

The challenged statute provides:

> Corneal removal by medical examiners.--
>
> (1) In any case in which a patient is in need of corneal tissue for a transplant, a district medical examiner or an appropriately qualified designee with training in ophthalmologic techniques may, upon request of any eye bank authorized under s. 732.918, provide the cornea of a decedent whenever all of the following conditions are met:
>
> (a) A decedent who may provide a suitable cornea for the transplant is under the jurisdiction of the medical examiner and an autopsy is required in accordance

> with s. 406.11.
>
> (b) No objection by the next of kin of the decedent is known by the medical examiner.
>
> (c) The removal of the cornea will not interfere with the subsequent course of an investigation or autopsy.
>
> (2) Neither the district medical examiner nor his appropriately qualified designee nor any eye bank authorized under s. 732.918 may be held liable in any civil or criminal action for failure to obtain consent of the next of kin.

The trial court decided this case by summary jdugment. The facts are not in dispute. On June 15, 1983, James White drowned while swimming at the city beach in Dunellon, Florida. Associate Medical Examiner Dr. Thomas Techman, who is an appellant in this cause, performed an autopsy on James' body at Leesburg Community

Hospital. On July 11, 1983, Anthony Powell died in a motor vehicle accident in Marion County. Medical Examiner Dr. William H. Shutze, who is also an appellant in this cause, performed an autopsy on Anthony's body. In each instance, under the authority of section 732.9185, the medical examiner removed corneal tissue from the decedent without giving notice to or obtaining consent from the parents of the decedent.

James' and Anthony's parents, who are the appellees in this case, each brought an action claiming damages for the alleged wrongful removal of their sons' corneas and seeking a judgment declaring

section 732.9185 unconstitutional.[1] The actions were subsequently consolidated.

In its judgment, the trial court noted that section 732.9185 "has as its purpose the commendable and laudable objective of providing high quality cornea tissue to those in need of same," but declared the statute unconstitutional on the grounds that it (1) deprives survivors

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[1]The Whites named as defendants Shutze, Techman, Keith Gauger, who is an investigator for the medical examiner's office in that district, and the State of Florida. The Powells named as defendants Shutze and the Monroe [sic] Regional Medical Center. Dade County, The Medical Eye Bank, Inc., North Florida Lions Eye Bank, Inc., Florida Lions Eye Bank, Inc., Florida Medical Association, Inc., Florida Society of Ophthalmology, Inc., and Eye Bank Association of America, Inc., were each permitted to intervene as parties in support of the constitutionality of section 732.9185. The Reverend Thomas J. Price of the Florida Conference of United Methodist Churches and the Rabbinical Association of Greater Miami filed amicus briefs in support of the appellees' position.

of their fundamental personal and property right to dispose of their deceased next of kin in the same condition as lawful autopsies left them, without procedural or substantive due process of law; (2) creates an invidious classification which deprives survivors of their right to equal protection; and (3) permits a taking of private property by state action for a non-public purpose, in violation of article X, section 6(a), of the Florida Constitution. The court concluded that the state has no compelling interest in non-consensual removal of appellees' decedents' corneal tissue that outweighs the survivors' right to dispose of their sons' bodies in the condition death left

them.[2] For the reasons expressed below, we reject these findings.

In addressing the issue of the statute's constitutionality, we begin with the premise that a person's constitutional rights terminate at death. See Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Silkwood v. Kerr-McGee Corp., 637 F.2d 743 (10th Cir. 1980), cert. denied, 454 U.S. 833, 102 S.Ct. 132, 70 L.Ed.2d 111 (1981); Guyton v. Phillips, 606 F.2d 248 (9th Cir. 1979), cert. denied, 445 U.S. 916, 100 S.Ct. 1276, 63 L.Ed.2d 600 (1980). If any rights exist, they belong to the decedent's next of kin.

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[2]The appellees also challenged as unconstitutional § 406.11, Fla.Stat. (1983), which provides medical examiners with the authority to perform autopsies under circumstances enumerated in the statute. The trial court upheld that statutory provision, and that finding is not challenged in this proceeding.

Next, we recognize that a legislative act carries with it the presumption of validity and the party challenging a statute's constitutionality must carry the burden of establishing that the statute bears no reasonable relation to a permissible legislative objective. Johns v. May, 402 So.2d 1166 (Fla. 1981). See also Harrah Independent School District v. Martin, 440 U.S. 194, 198, 99 S.Ct. 1062, 1064, 59 L.Ed.2d 248 (1979). In determining whether a permissible legislative objective exists, we must review the evidence arising from the record in this case.

The unrebutted evidence in this record establishes that the State of Florida spends approximately $138 milion each year to provide its blind with the basic necessities of life. At present, approxiamtely ten percent of Florida's

blind citizens are candidates for cornea transplantation, which has become a highly effective procedure for restoring sight to the functionally blind. As advances are made in the field, the number of surgical candidates will increase, thereby raising the demand for suitable corneal tissue. The increasing number of elderly persons in our population has also created a great demand for corneas because corneal blindness often is age-related. Further, an affidavit in the record states:

> Corneal transplants are particularly important in newborns. The brain does not learn to see if the cornea is not clear. There is a critical period in the first few months of life when the brain 'learns to see.' If the cornea is not clear, the brain not only does not 'learn to see,' but the brain loses its ability to

> 'learn to see.' Hence, corneal transplant in children must be made as soon as practicable after the problem is discovered. Without the medical examiner legislation, there would be virtually no corneal tissue available for infants and these children would remain forever blind.

The record reflects that the key to successful corneal transplantation is the availability of high-quality corneal tissue and that corneal tissue removed more than ten hours after death is generally unsuitable for transplantation. The implementation of section 732.9185 in 1977 has, indisputably, increased both the supply and quality of tissue available for transplantation. Statistics show that, in 1976, only 500 corneas were obtained in Florida for transplantation while, in 1985, more than 3,000 persons in Florida

had their sight restored through corneal transplantation surgery.

The record also demonstrates that a qualitative difference exists between corneal tissue obtained through outright donation and tissue obtained pursuant to section 732.9185. In contrast to the tissue donated by individuals, which is largely unusable because of the advanced age of the donor at death, approximately eighty to eighty-five percent of tissue obtained through medical examiners is suitable for transplantation. The evidence establishes that this increase in the quantity and quality of available corneal tissue was brought about by passage of the statute and is, in large part, attributable to the fact that section 732.9185 does not place a duty upon medical examiners to seek out the next of kin to obtain consent

for cornea removal. An affidavit in the record reveals that, before legislation authorized medical examiners in California to remove corneas without the consent of the next of kin, the majority of the families asked by the Los Angeles medical examiner's office responded positively; however, approximately eighty percent of the families could not be located in sufficient time for medical examiners to remove usable corneal tissue from the decedents.

An autopsy is a surgical dissection of the body; it necessarily results in a massive intrusion into the decedent. This record reflects that cornea removal, by comparison, requires an infinitesimally small intrusion which does not affect the decedent's appearance. With or without cornea removal, the decedent's eyes must

be capped to maintain a normal appearance.

Our review of section 732.9185 reveals certain safeguards which are apparently designed to limit cornea removal to instances in which the public's interest is greatest and the impact on the next of kin the least: corneas may be removed only if the decedent is under the jurisdiction of the medical examiner; an autopsy is mandated by Florida law; and the removal will not interfere with the autopsy or an investigation of the death. Further, medical examiners may not automatically remove tissue from all decedents subject to autopsy; rather, a request must be made by an eye bank based on a present need for the tissue.

[1] We conclude that this record clearly establishes that this statute reasonably achieves the permissible

legislative objective of providing sight to many of Florida's blind citizens.

We next address the trial court's finding that section 732.9185 deprives appellees of a fundamental property right. All authorities generally agree that the next of kin have no property right in the remains of a decedent. Although, in Dunahoo v. Bess, 146 Fla. 182, 200 So. 541 (1941), this Court held that a surviving husband had a "property right" in his wife's body which would sustain a claim for negligent embalming, id. at 183, 200 So. at 542, we subsequently clarified our position to be consistent with the majority view that the right is limited to "possession of the body ... for the purpose of burial, sepulture or other lawful disposition," and that interference with this right gives rise to a tort

action.[3] Kirksey v. Jernigan, 45 So.2d 188, 189 (Fla.1950). More recently, we affirmed the district court's determination that the next of kin's right in a decedent's remains is based upon "the personal right of the decedent's next of kin to bury the body rather than any property right in the body itself." Jackson v. Rupp, 228 So.2d 916, 918 (Fla. 4th D.C.A. 1969), affirmed, 238 So.2d 86 (Fla.1970). The view that the next of kin has no property right but merely a limited right to possess the body for burial purposes is universally accepted by courts and commentators. See Lawyer

[3]The American Law Institute sets forth the tort of interfering with the "right of burial" as follows: "One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body." Restatement (Second) of Torts § 868 (1979).

v. Kernodle, 721 F.2d 632 (8th Cir.1983); Sinai Temple v. Kaplan, 54 Cal.App.3d 1103, 127 Cal.Rptr. 80 (1976); Dougherty v. Mercantile-Safe Deposit & Trust Co., 282 Md. 617, 387 A.2d 244 (Ct.App.1978); Finn v. City of New York, 70 Misc2d 947, 335 N.Y.S.2d 516 (Civ.Ct.1972), rev'd on other grounds, 76 Misc.2d 388, 350 N.Y.S.2d 552 (Sup.Ct.1973); Sullivan v. Catholic Cemeteries, Inc., 113 R.I. 65, 317 A.2d 430 (1974); Sadler & Sadler, Transplantation and the Law: The Need for Organized Sensitivity, 57 Geo.L.J. 5 (1968); Sanders & Dukeminier, Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation, 15 U.C.L.A.L.Rev. 357 (1968). Prosser states:

> A number of decisions have involved the mishandling of dead bodies.... In these cases the courts have talked of a somewhat

> dubious 'property right' to the body, usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that it is in reality the personal feelings of the survivors which are being protected, under a fiction likely to deceive no one but a lawyer.

W. Prosser, The Law of Torts, 43-44 (2d ed. 1955) (footnotes omitted). The Maryland Court of Appeals has summarized the law as follows:

> It is universally recognized that there is no property in a

dead body in a commercial or material sense. '[I]t is not part of the assets of the estate (though its disposition may be affected by the provision of the will); it is not subject to replevin; it is not property in a sense that will support discovery proceedings; it may not be held as security for funeral costs; it cannot be withheld by an express company, or returned to the sender, where shipped under a contract calling for cash on delivery; it may not be the subject of a gift causa mortis; it is not common law larceny to steal a corpse. Rights in a dead body exist ordinarily only for purposes of burial and, except with statutory authorization, for no other purpose.' Snyder v. Holy Cross Hosp., 30 Md.App. 317 at 328 n. 12, 352 A.2d 334 at 340, quoting P.E. Jackson, The Law of Cadavers and of

Burial and Burial Places (2d ed. 1950).

Daugherty, 282 Md. at 620 n. 2, 387 A.2d at 246 n.2.

[2] Under the facts and circumstances of these cases, we find no taking of private property by state action for a non-public purpose in violation of article X, section 6, of the Florida Constitution. We note that the right to bring an action in tort does not necessarily invoke constitutional protections. Decisions of the United States Supreme Court have clearly established that the loss of a common law right by legislative act does not automatically operate as a deprivation of substantive due process. Tort actions may be restricted when necessary to obtain a permissible legislative objective. See Duke Power Co. v. Carolina Environmental

Study Group, Inc., 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 2638 n. 32, 57 L.Ed.2d 595 (1978).

[3] Appellees also assert that their right to control the disposition of their decedents' remains is a fundamental right of personal liberty protected against unreasonable governmental intrusion by the due process clause. Appellees argue that, because the statute permits the removal of a decedent's corneas without reference to his family's preferences, it infringes upon a right, characterized as one of religion, family, or privacy, which is fundamental and must be subjected to strict scrutiny. Appellees rely upon a line of decisions from the Unitead States Supreme Court which recognize the freedom of personal choice in matters of family life as one of the liberties protected by

the due process clause. See, e.g., Cleveland Board of Education v. La-Fleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Wisconsin v. Yoder, 406 U.S 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Appellees also point out that the United States Supreme Court has found rights to personal privacy in connection with activities relating to marriage, Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); procreation, Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); contraception, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); abortion, Roe v. Wade; and child-rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

According to appellees, the theme which runs through these cases, and which compels the invalidation of section 732.9185, is the protection from governmental interference of the right of free choice in decisions of fundamental importance to the family.

We reject appellees' argument. The cases cited recognize only freedom of choice concerning personal matters involved in existing, ongoing relationships among living persons as fundamental or essential to the pursuit of happiness by free persons. We find that the right of the next of kin to a tort claim for interference with burial, established by this Court in Dunahoo, does not rise to the constitutional dimension of a fundamental right traditionally protected under either the United States or Florida Constitution.

Neither federal nor state privacy provisions protect an individual from every governmental intrusion into one's private life, see Florida Board of Bar Examiners Re: Applicant, 443 So.2d 71 (Fla.1983), especially when a statute addresses public health interests. Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (state accorded wide latitude in constitutional privacy terms to safeguard health); Roe v. Wade (review less exacting when state asserts effort to safeguard health).

The record contains no evidence that the appellees' objections to the removal of corneal tissues for human transplants are based on any "fundamental tenets of their religious beliefs." Wisconsin v. Yoder, 406 U.S. at 218, 92 S.Ct. at 1534. "[T]he very concept of ordered

liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." Id. at 215-16, 92 S.Ct. at 1533.

[4] We also reject the trial court's finding that section 732.9185 creates an invidious classification regarding the next of kin of deceased persons. "Legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others." Parham v. Hughes, 441 U.S. 347, 351, 99 S.Ct. 1742, 1745, 60 L.Ed.2d 264 (1979). We find that the statute's effect on the next of kin is incidental and does not offend equal protection.

In view of our finding that the appellees have no protectable liberty or

property interest in the remains of their decedents, we need not address the argument that section 732.9185 violates procedural safeguards guaranteed by the due process clause. See Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

In conclusion, we hold that section 732.9185 is constitutional because it rationally promotes the permissible state objective of restoring sight to the blind.[4] In so holding, we note that laws regarding the removal of human tissues for transplantation implicate moral, ethical, theological, philosophical, and economic

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[4]Courts in Georgia and Michigan have upheld the constitutionality of cornea removal statutes similar to Florida's. See Georgia Lions Eye Bank, Inc. v. Lavant, 255 Ga. 60, 335 S.E.2d 127 (1985), cert. denied, ___ U.S. ____, 106 S.Ct. 1464, 89 L.Ed.2d 721 (1986); Tillman v. Detroit Receiving Hospital, 138 Mich.App. 683, 360 N.W.2d 275 (1984).

concerns which do not readily lend themselves to analysis within a traditional legal framework. Applying constitutional standards of review to section 732.9185 obscures the fact that at the heart of the issue lies a policy questioin which calls for a delicate balancing of societal needs and individual concerns more appropriately accomplished by the legislature.

For the reasons expressed, we reverse the trial court's order and remand this cause to the trial court with directions to enter judgment consistent with this opinion.

It is so ordered.

McDONALD, C.J., and ADKINS, BOYD, EHRLICH and BARKETT, JJ., concur.

SHAW, J., dissents with an opinion.

SHAW, Justice, dissenting.

Before setting out my disagreements

with the substance of the majority opinion, it is necessary to first clarify the procedural posture of these cases.

The Whites brought a complaint in four counts against appellants Gauger, Techman and Shutze concerning the circumstances surrounding an autopsy and cornea removal performed on their teenage son following his accidental drowning on 15 June 1983. Techman and Shutze are medical doctors and, respectively, an assistant medical examiner and the medical examiner in the Fifth Judicial Circuit. Gauger is a non-medical investigator in Marion County. As amended in four counts, the comlaint alleges, inter alia, as follows. Count I alleges that the Whites had objected to the autopsy and any alteration of their son's body; that no cause of death other than accidental

drowning was reasonable in that five persons, including an off-duty highway patrolman, had witnessed the drowning; that appellant Shutze had established a policy and mechanism for performing autopsies on all drowning victims contrary to section 406.11, Florida Statutes (1981); that decisions on autopsies in Marion County are made by Gauger, a private employee of Shutze & Techman P.A., who obtains and transports bodies to Lake County where autopsies are performed; that appellant Shutze permitted Gauger to falsely represent himself as a member of the medical examiner's staff; that Shutze & Techman P.A. performed autopsies on a piecework basis and directly benefited from the number of autopsies performed; that the autopsy was performed contrary to section 872.04, Florida Statutes (1981);

that appellant Gauger was untrained in opthamology and unqualified to be designated under section 732.9185, Florida Statutes (1981), as a person to provide corneas; that conditions precedent to removal of corneas under section 732.9185 were not met; and that the Whites have suffered damages by reason of extreme mental pain and anguish for which compensatory and punitive damages should be paid. Counts II and III are actions pursuant to chapter 86, Florida Statutes (1981), seeking declaratory judgments as to the Whites' rights, duties, and privileges under sections 732.9185 and 406.11 which allege that both sections are unconstitutional both facially and as applied. Count IV is an action alleging violation of civil rights under Title 42, U.S.C. § 1983 and the United States Constitution.

The Powells also brought a complaint in four counts against appellants Shutze and Monroe Regional Medical Center (MRMC) concerning the autopsy and cornea removal performed on their twenty-year-old son following his death in a single vehicle accident on 11 July 1983. Count I alleges that appellants performed an arbitrary, capricious and unlawful autopsy and removed corneas without meeting the conditions precedent of section 732.9185. Count II alleges that section 732.9185 is facially unconstitutional and directly contrary to section 732.910, et seq., Florida Statutes (1981). Counts III and IV allege mental anguish and financial loss caused by, respectively, appellants Shutze and MRMC.

The two cases were consolidated and came before the trial judge on motions for

summary judgment. In the order under appeal, the trial judge found that section 406.11 was constitutional on its face and as applied, but that section 732.9185 was facially unconstitutional. The trial judge did not rule on a motion that section 732.9185 was unconstitutional as applied. The order comes directly to us on the certification of the Fifth District Court of Appeal that it contains a question of great public importance which requires immediate resolution.

The only question legitimately before us is whether the trial court erred in granting a summary judgment that section 732.9185 is facially unconstitutional. In the present posture of the case, we are not presented with the issues of whether sections 406.11 and 732.9185 were complied with in performing these autopsies and

cornea removals, of whether the two sections have been constitutionally applied, of whether section 406.11 is facially constitutional, of whether any or all of the appellants are liable, and of the Whites' rights, duties and privileges under sections 406.11 and 732.9185. Without specifying that it is addressing the narrow issue of the facial constitutionality of section 732.9185, the majority opinion addresses a wide range of issues which are only tenuously related to the narrow issue before us. The majority then reverses and remands with directions that a judgment for appellants (defendants) be entered. In my view this disposition is completely premature. My review of the record indicates there are substantial questions of material fact which preclude entry of summary judgments for the

defendants.

The thrust of the majority opinion appears to be that the state and its agents have an unqualified right to the body of a decedent provided at some point the remains of the remains are turned over to the next of kin. I do not believe this is the law. I am persuaded, as was the trial judge below, that since time immemorial it has been the duty and the right of the next of kin to take control, possession, and custody of the body and remains of a deceased family member. These duties and rights, predicated on religious, moral, and philosophical grounds, were recognized at common law and were not totally surrendered to tne state when our constitutions were adopted. These rights are not only reserved to the people under article I, section 1 of the

Florida Constitution, but are affirmatively protected as religious, liberty, and privacy rights under article I, sections 3, 9, and 23 and by various statutes of the state.

The scope of the common law and the rights retained by the people should not, in my view, be narrowly construed. As the United States Supreme Court has said:

> What is the common law? According to Kent: 'The common law includes those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature.' 1 Kent, Com. 471. As Blackstone says: 'Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the

solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or lex non scripta, of this Kingdom. This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole Kingdom, and form the common law, in its stricter and more usual signification.' 1 Bl.Com. 67. In Black's Law Dictionary, page 232, it is thus defined: 'As distinguished from law created by the enactment of legislature, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial

> antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.'

Western Union Telegraph Co. v. Call Publishing Co., 181 U.S. 92 101-02, 21 S.Ct. 561, 564, 45 L.Ed. 765 (1901) (emphasis supplied). The right to privacy under section 23 is particularly pertinent in my view because the right to be let alone and to be free from government intrusion into private life is, in large part, simply a constitutional affirmation of common law rights and customs surrounding the exercise of private, as contrasted to public, liberties. The right to possess and control the body of a deceased loved one and to honor and celebrate the decedent's life and death through

appropriate commemoration is a quintessential privacy right.

These personal rights of the next of kin are qualified only by the overriding police power of the state to regulate the care and disposition of dead bodies for the protection of public health and welfare. I have no doubt that the state may require an autopsy when there is a founded suspicion that death was by criminal action, when there is a likelihood that the death was caused by a communicable disease, or, even, when the death is simply inexplicable and the cause needs to be determined. I do not agree that the agents of the state may be constitutionally granted carte blanche to conduct autopsies based on whim, bureaucratic convenience, curiosity, pecuniary gain, or "policy." A significant question of material fact is

whether the agents exceeded their statutory authority and we should have this issue resolved before we address the constitutionality of the statutes. The record consists largely of a series of depositions and affidavits taken or given in connection with the Whites' complaint and with the motions for summary judgments. The Powells' complaint was filed well after the Whites' complaint and contains little of record.

The assistant state attorney assigned to Marion County was deposed and testified as follows regarding the policy performing autopsies. He was of the opinion that autopsies should be conducted on all drowning and vehicle accident victims and had communicated this policy to the medical examiner and law enforcement personnel. Autopsies were necessary even

if there was no suggestion of criminal culpability or doubt about the cause of death. Autopsies were needed in case there were civil suits arising from the death and were important to insurance companies, families, and anyone who might have an interest in the facts. He did not believe the medical examiner had discretion to forego an autopsy when one of the enumerated circumstances of section 406.11 existed, for example, an accidental death. He had conducted an investigation in to the cornea removals from decedent White and found the removals were performed on the authority of the investigator, appellant Gauger. Further, in his opinion, there had been an objection by the White family to the removal of the corneas prior to their removal.

The medical examiner, appellant

Shutze, recited the following in two affidavits. It is the policy of the medical examiner's office to perform full autopsies on all persons who die in Marion County by accident, including, specifically, drowning or motor vehicle accidents. The medical examiner bases this policy on section 406.11 and the request of the state attorney's office. The purposes of autopsies are to (1) determine cause of death, (2) identify health or safety hazards, (3) obtain evidence of criminal conduct, and (4) advance the understanding of medical science. Appellant Gauger is an investigator working for appellant Shutze's professional association; he is not an employee of the medical examiner's office. Appellant Gauger has been instructed to notify the medical examiner's office of all deaths in Marion County. Appellant

Gauger is the medical examiner's authorized designee for Marion County under section 732.9185. The medical examiner or an assistant medical examiner makes the final decision on whether an autopsy should be performed in each specific instance. Appellant Techman performed the autopsy on the Whites' decedent and appellant Shutze performed the autopsy on the Powells' decedent. Objections to autopsies are considered but the final decision is made by the medical examiner or assistant medical examiner. Objections to cornea removals are not solicited but are honored if known. Eye bank personnel, not the medical examiner's office, determine the suitability of corneas for transplant.

The assistant medical examiner, appellant Techman, in an affidavit recited statements on the general policy and

practices of the medical examiner's office which parallel those of appellant Shutze. In addition, appellant Techman recited that he performed the White autopsy and signed the death certificate. He alone made the decision to perform the autopsy, relying on policy, section 406.11, and the request of the state attorney's office. He had no police report available and his only knowledge of the circumstances surrounding the death was based on the investigator's report by appellant Gauger. The report reflected the contact with the family but did not indicate any objection to an autopsy. Had there been any, he would nevertheless have performed the autopsy. He had no knowledge that the corneas were going to be removed, did not authorize their removal, and learned of their removal for the first time when he

began the autopsy.

Appellee White was deposed and testified as follows. He was called to the hospital where his son's body had been taken and met with appellant Gauger. He never met or talked with appellants Shutze and Techman. Appellant Gauger told him that the son's death was a simple accidental drowning with no suggestion of foul play. However, he was told state law required an autopsy be performed and that the body was to be shipped to another county for that autopsy. Appellee White objectead strenuously to the autopsy but believed he had no recourse under the law and asked that the intrusion be kept to a minimum. Appellant Gauger told him it would only be necessary to make a small incision into the chest to probe the lungs. Nothing was said of cornea removal and he only learned

of it when he viewed his son's body at the funeral home following the return of the body after the autopsy. The body's eyes, particularly the right eye, were noticeably sunken into the skull. The funeral director explained this sunken condition of the eyes as caused by the cornea revmoval.

The record also contains minor corrections to a deposition by appellant Gauger. However, the deposition itself is not contained in the record. This deposition could be highly significant in that appellant Gauger appears to be the central figure in these episodes.

Attempting to recount all of the significant questions of material fact which appear on the face of this record would be excessively burdensome and would be of little benefit at this stage of the

proceedings. Moreover, any list would likely be incomplete. It is appropriate, however, to refer to several as illustrative of the issues not yet addressed. The two overarching issues are, first, whether the policies and practices of the medical examiner's office followed in these two cases are consistent with the provisions of sections 406.11 and 732.9185. Second, assuming the statutes were complied with, were they constitutionally applied. Section 925.09, Florida Statutes (1981), authorizes the state attorney to have an autopsy performed when "it is necessary in determining whether or not death was the result of a crime." Two significant questions of material fact engendered by this section are whether these two autopsies, and accompanying cornea removals, were performed under the authority of the

state attorney, and, if so, was that authority legally exercized. Section 406.11(1) authorizes the medical examiner to perform such autopsies as he deems necessary to determine the cause of death. An additional question of material fact is whether the medical examiner's office has a policy or practice of performing autopsies on all accident victims, specifically drowning and vehicle accident victims. In this connection, I note also section 872.01, Florida Statutes (1981), titled Dealing in dead bodies; section 872.04, Florida Statutes (1981), titled Autoposies; consent required, exception; and chapter 936, Florida Statutes (1981), titled Inquests of the Dead. Significant questions of material fact also arise in connection with section 732.9185. Two general questions, with numerous subsidiary

questions, are whether the conditions precedent to cornea removal were present and whether the provisions of section 732.9185 were followed. The issue of the constitutionality of sections 406.11 and 732.9185, as applied, is inchoate at this stage of the proceeding.

The legislature is apparently of the view, contrary to the majority, that a decedent's next of kin have the right to possess and control the decedent's body and that both the decedent and next of kin may control the removal and donation of human organs. The various provisions of chapter 245, Florida Statutes (1981), titled Disposition of Dead Bodies, are grounded on the right of the next of kin to claim control and possession of dead bodies. Section 245.07 appears to rule out the state's use of dead bodies

for the advancement of medical science unless the bodies are unclaimed or donated under section 245.11.[1] On the question of the donation and removal of organs, chapter 732, part X, Florida Statutes (1985), authorizes and establishes programs whereby both the decedent and survivors may donate organs of a decedent. Section 732.912 is particularly pertinent. Subsection (1) authorizes the donation of organs by will; subsection (2) authorizes the donation of a decedent's organs by next of kin in a priority order and also recognizes the right of next of kin to veto the removal or donation of organs.

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[1]This does not mean that medical science may not be advanced as a by-product of autopsies which are legally conducted for other reasons under § 406.11. It does suggest, however, that advancement of medical science, without more, is not legal justification for conducting an autopsy on bodies which come into the hands of the medical examiner.

Moreover, section 732.9185(1)(b) itself recognizes the right of the next of kin to veto the donation of the cornea.[2] The crucial point is that part X of chapter 732 is grounded on the right of the decedent and next of kin to control the removal and disposition of organs taken from the body of the decedent. If this is not so, part X is grounded on air. It is a conundrum in that it is simply not legally possible nor permissible to donate or control the donation of an article

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[2]Section 732.9185(1)(b) states: "[n]o objection by the next of kin of the decedent is known by the medical examiner." Subsection (2) provides that the medical examiner will not be held liable for "failure to obtain consent of the next of kin." The words "failure to obtain" suggest an unsuccessful effort. These provisions are apparently being interpreted as authority not to seek consent from next of kin who are physically present and readily available to grant or deny consent. Is that the legislative intent? The trial court should hear arguments and address this point.

which does not belong to the donor.

I agree that these cases present issues of great public importance which may, at some point, require this Court's attention. At this point, however, there is substantial doubt that sections 406.11 and 732.9185 have been correctly interpreted and applied by the cognizant authorities in Marion County. The issues presented by these suits, particularly the counts requesting a declaratory judgment of the rights, duties, and privileges of the next of kin, are likely to be with us a long time and to become even more intense as medical science advances and organ transplants increase in number. I am simply not prepared to rush to judgment on issues as important as these based on a summary judgment. These issues are important, but we are not a legislative

body rushing to enact emergency legislation to meet an urgent state need before the end of a legislative session. These cases should be remanded with instructions that the trial go forward and a record be developed.